

NO. 41638-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH CORTEZ JONES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 10-1-01462-6

BRIEF OF RESONDENT

MARK LINDQUIST
Prosecuting Attorney

By
Kimberley DeMarco
Deputy Prosecuting Attorney
WSB # 39218

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.</u>	1
1.	Has defendant failed to show that he received ineffective assistance of counsel where defendant has not shown deficient performance and prejudice?.....	1
2.	Has defendant failed to show that the prosecutor committed any misconduct, let alone misconduct that was so flagrant and ill-intentioned that any prejudice could not have been cured by instruction?.....	1
3.	Was defendant's right to confrontation protected where the court did not admit testimonial statements by a non-testifying witness, but did admit non-testimonial statements that were made to a 911 operator?.....	1
4.	Did the State present sufficient evidence to convince a rational fact finder beyond a reasonable doubt that defendant was guilty of burglary in the first degree?	1
5.	Did the trial court properly sentence defendant to a mandatory term of community custody?	1
6.	Did the trial court act within its discretion when it denied defendant's post trial motion for relief for judgment because the declarations provided by defendant were not credible?.....	1
7.	Has defendant failed to show that his trial contained any prejudicial error at all, let alone that it was rife with error warranting reversal under the doctrine of cumulative error?.....	2
B.	<u>STATEMENT OF THE CASE.</u>	2
1.	Procedure	2
2.	Facts.....	4

C.	<u>ARGUMENT</u>	6
1.	DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.	6
2.	DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.	15
3.	DEFENDANT’S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE TRIAL COURT ADMITTED THE 911 TAPE AS MS. YOUNG’S STATEMENTS TO THE 911 OPERATOR WERE NONTESTIMONIAL.....	23
4.	THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF BURGLARY IN THE FIRST DEGREE.....	27
5.	THE TRIAL COURT PROPERLY SENTENCED DEFENDANT TO A MANDATORY TERM OF COMMUNITY CUSTODY.	31
6.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT’S POST TRIAL MOTION FOR RELIEF FROM JUDGMENT.....	32
7.	DEFENDANT HAS FAILED TO SHOW THAT HIS TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR	36
D.	<u>CONCLUSION</u>	40

Table of Authorities

State Cases

<i>In re Davis</i> , 152 Wn.2d 647, 717, 101 P.3d 1 (2004)	13
<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	37
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	27
<i>State v. Aguirre</i> , 73 Wn. App. 682, 688, 871 P.2d 616, <i>review denied</i> , 124 Wn.2d 1028 (1994)	34
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	39
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963)	39
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988).....	27
<i>State v. Barry</i> , 25 Wn. App. 751, 758, 611 P.2d 1262 (1980)	33
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	7, 15
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996)	16, 17
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	7, 17
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....	14, 16
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	28
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987)	28
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	7
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984)	37, 39
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	28

<i>State v. Davis</i> , 154 Wn.2d 291, 111 P.3d 844 (2005).....	24
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	28
<i>State v. Demery</i> , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).....	12
<i>State v. Dennis</i> , 67 Wn. App. 863, 865, 840 P.2d 909 (1992)	34
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578-79, 79 P.3d 432 (2003)	16, 18
<i>State v. Gregory</i> , 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)	13, 16
<i>State v. Hayes</i> , 81 Wn. App. 425, 442, 914 P.2d 788, <i>review denied</i> , 130 Wn.2d 1013, 928 P.2d 413 (1996).....	15
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	27
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998).....	37, 38
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	27
<i>State v. Kinard</i> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....	38
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	37
<i>State v. Lord</i> , 117 Wn.2d 829, 861, 822 P.2d 177 (1991).....	14
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	27
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	16
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	16
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	27
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	7, 14
<i>State v. Pierce</i> , 155 Wn. App. 701, 710, 230 P.3d 237 (2010).....	33
<i>State v. Pugh</i> , 167 Wn.2d 825 831-32, 225 P.3d 892 (2009).....	24, 25, 26
<i>State v. Riofta</i> , 166 W.2d 358, 369, 209 P.3d 467 (2009).....	33

<i>State v. Ross</i> , 106 Wn. App. 876, 880, 26 P.3d 298 (2001), <i>review denied</i> , 145 Wn.2d 1016, 41 P.3d 483 (2002).....	29
<i>State v. Russell</i> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).....	37
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	28
<i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).....	17
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	38, 39
<i>State v. Swan</i> , 114 Wn.2d 613, 642, 790 P.2d 610 (1990).....	32
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990).....	23
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	6, 7, 8
<i>State v. Thomas</i> , 150 Wn.2d 821, 856, 83 P.3d 970 (2004)	23
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	39
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	27
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988)	38
<i>State v. Warnick</i> , 121 Wn. App. 737, 746, 90 P.3d 1105 (2004).....	9
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	16
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	38
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).....	15
<i>State v. Williams</i> , 96 Wn.2d 215, 223, 634 P.2d 868 (1981)	33

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	16
<i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).....	37

<i>Crawford v. Washington</i> , 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).....	23
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990)	12
<i>Davis v. Washington</i> , 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006).....	23, 24, 25, 26
<i>Hammon v. State</i> , 829 N.E.2d 444 (Ind.2005).....	24, 25
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (9th Cir. 1995)	8
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	6, 11
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	8
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999).....	36
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	36, 37
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6, 7, 8, 15
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	6
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991)	11
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).....	8

Constitutional Provisions

Sixth Amendment of the United States Constitution.....	6, 8, 23
--	----------

Statutes

RCW 9.94.701	32
RCW 9.94A.701(2).....	31
RCW 9.94A.715.....	31
RCW 9.94A.728.....	32
RCW 9.94A.728(1).....	31
RCW 9.94A.728(1) and (2)	31
RCW 9.94A.728(2)(a)	31

Rules and Regulations

CrR 7.8	32
CrR 7.8(5)	34
CrR 7.8(b)(1).....	33

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that he received ineffective assistance of counsel where defendant has not shown deficient performance and prejudice?
2. Has defendant failed to show that the prosecutor committed any misconduct, let alone misconduct that was so flagrant and ill-intentioned that any prejudice could not have been cured by instruction?
3. Was defendant's right to confrontation protected where the court did not admit testimonial statements by a non-testifying witness, but did admit non-testimonial statements that were made to a 911 operator?
4. Did the State present sufficient evidence to convince a rational fact finder beyond a reasonable doubt that defendant was guilty of burglary in the first degree?
5. Did the trial court properly sentence defendant to a mandatory term of community custody?
6. Did the trial court act within its discretion when it denied defendant's post trial motion for relief for judgment because the declarations provided by defendant were not credible?

7. Has defendant failed to show that his trial contained any prejudicial error at all, let alone that it was rife with error warranting reversal under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On April 5, 2010, the State charged JOSEPH CORTEZ JONES, hereinafter “defendant” with one count of burglary in the first degree and one count of assault in the second degree. CP¹ 1-2.

On October 11, 2010, the parties proceeded to jury trial before the Honorable Kitty-Ann VanDoorninck. RP 1. Prior to the beginning of testimony, the court ruled that the 911 tape was an excited utterance, but was concerned about the State’s ability to identify the declarant, as she was not present at trial. RP 13-14. The court reserved ruling on the admissibility of the 911 tape. RP 16. The court eventually ruled that the 911 tape would be admitted if the responding law enforcement officer could identify the declarant through her statements to him at the scene. RP 23-24.

¹ Citations to Clerk’s Papers will be to “CP.” Citations to the verbatim report of proceedings will be to “RP” for the trial transcript. The pre and post trial hearings were not sequentially numbered, so references to those transcripts will be to “RP” followed by the date of the hearing.

The jury began deliberations on October 13, 2010. RP 185. The jury found defendant guilty as charged later the same day. RP 186-87.

On December 17, 2010, the parties appeared for sentencing. RP 192. Defendant requested that sentencing be set over in order to do further investigation for post-trial motions. RP 193. The court denied the request for the set over, as sentencing had been postponed several times. RP 193. The court acknowledged that defendant's post-trial motions could be heard at a later date. RP 193. The court sentenced defendant to a high-end, standard-range² sentence of 75 months for the burglary, and 20 months for the assault, both to run concurrently. CP 107-20; RP 202.

Defendant filed a timely notice of appeal. CP 137-51.

On June 17, 2011, the court held a hearing for defendant's CrR 7.8 motion for a new trial. CP 121-28; RP (6/17/11) 2. Defendant argued that his trial counsel was ineffective for failing to call three witnesses and provided declarations for each witness. CP 179-85; RP (6/17/11) 2-4. The court denied defendant's motion, ruling that the declarations from defendant's friends and family were not credible and that defendant had not wanted one of the witnesses to appear for trial. RP (6/17/11) 10-11.

² Defendant had an offender score of 6 for the burglary conviction, giving him a standard range of 57 to 75 months, and an offender score of 4 for the assault conviction, giving him a standard range of 15 to 20 months. CP 107-20.

2. Facts

On April 1, 2010, Donald Barrows went to pick up his friend, Monique Young, to give her a ride to work. RP 40. When he arrived, Ms. Young was alone in the apartment. RP 41. Approximately ten to fifteen minutes after he arrived, defendant appeared and started banging on the front door. RP 42-43.

Defendant demanded to be let in, which frightened Ms. Young. RP 43. Ms. Young told defendant, “please don’t do this,” and she did not unlock the door to let him in. RP 44. Defendant kicked in the door, causing it to fall to the ground and Ms. Young ran farther into the apartment. RP 44-45.

Defendant immediately came toward Mr. Barrows and punched him in the face. RP 45, 48. The men moved throughout the apartment during the fight. RP 45-52. They ended up in a bedroom closet, where defendant sat on Mr. Barrows and choked him with two hands around his neck until Mr. Barrows lost consciousness. RP 45, 49.

When Mr. Barrows regained consciousness, defendant was gone. During the fight, Ms. Young called 911. *See* Exhibit 1. Pierce County Sheriff Sergeant Glen Carpenter responded to the 911 call. RP 106.

When Sergeant Carpenter arrived at the scene, only Ms. Young and Mr. Barrows were present. RP 108. At the beginning of Sergeant Carpenter’s investigation, Ms. Young was upset and gave him a statement

which was consistent with the information she provided to the 911 operator. RP 108-09. As the interview progressed, however, she became less cooperative. RP 109.

Sergeant Carpenter saw that the front door to the apartment had damage and the frame was lying on the floor. RP 110-11. He also saw damage within the apartment. RP 110. Ms. Young started cleaning the debris before he could take photos to preserve the scene. RP 114. When Sergeant Carpenter saw Mr. Barrows he called an ambulance because Mr. Barrows looked like he had been “beaten within an inch of his life.” RP 110. Sergeant Carpenter saw red marks in the shape of hand prints around Mr. Barrows’ neck. RP 113.

Mr. Barrows initially refused to go to a hospital, so the State sent photos taken by Sergeant Carpenter to Dr. Yolanda Duralde, the medical director for child abuse at Mary Bridge Hospital for review. RP 83, 90, 115. Based on Dr. Duralde’s review of the photographs, it was her opinion that the marks on Mr. Barrows’ neck were consistent with strangulation. RP 90-92.

C. ARGUMENT.

1. DEFENDANT RECEIVED CONSTITUTIONALLY
EFFECTIVE ASSISTANCE OF COUNSEL AS
DEFENDANT CANNOT SHOW DEFICIENT
PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she

was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

- a. Counsel's failure to call Ms. Young and Marcia Lane as witnesses does not represent deficient performance as Ms. Young avoided testifying at trial and both witnesses' testimony was potentially prejudicial and irrelevant.

Deciding which witnesses to call is particularly a matter of trial strategy and will not generally support a claim of ineffective assistance of counsel. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004). Defendant's claim that counsel was ineffective for not calling Ms. Young and her sister, Marcia Lane, as witnesses is without merit.

Based on the record below, it is unlikely that Ms. Young would have appeared for trial even if she had been subpoenaed by defense counsel. Ms. Young had informed the prosecutor by telephone that she would be present at trial and that she would be recanting her statements to law enforcement. RP 7-9; RP (6/17/11) 6-7. As she avoided all attempts at service, Ms. Young was the subject of a material witness warrant issued by the State. RP 7, 31; RP (6/17/11) 7. Ms. Young had every opportunity to attend trial and tell her version of the event, but chose to absent herself from the proceeding. Instead, she submitted a declaration after the fact and denied the jury an opportunity to evaluate her credibility. Nothing in the record indicates that she was available as a witness.

Even if Ms. Young was available, there were legitimate reasons not to call her as a witness for the defense. According to her declaration, Ms. Young's testimony would have directly contradicted her statements to law enforcement which would have lessened her credibility. *Compare* CP 129-30 *with* Exhibit 1. Ms. Young also had the potential for exhibiting bias, as she was apparently in a close relationship with defendant. CP 129-30; RP 122-23.

Finally, her testimony had the potential to undermine defendant's theory of the case. Defendant's testimony suggested that he had no legal responsibility for Ms. Young's residence. Defendant stated, "She stayed at my house. I stayed at her house. She has a key to my house. I had a key to her house." RP 122. Defendant described the apartment as belonging to Ms. Young. *See* RP 122-23. Defendant testified that he did not walk away because he and Ms. Young were in a relationship, not because he was on the lease and had a right to be present. *See* RP 127. Defendant never testified that he was on the lease for the apartment or that he paid the rent. If Ms. Young testified that defendant was on the apartment's lease, it could have had a negative impact on defendant's case by 1) being disproved with a copy of the lease, 2) undermining defendant's story of being a nice guy who just happened to stop by on his way home to give his girlfriend a ride to work, or 3) affecting the jury's view of defendant's lifestyle as being a person who would pay for an

apartment for a woman who worked in a strip club while living somewhere else.

Similarly, counsel's failure to call Marcia Lane as a witness was not deficient performance. A review of the declaration provided by Ms. Lane indicates that her testimony would have been completely irrelevant and inadmissible. Ms. Lane claims she had "first hand knowledge" of what transpired in the apartment on April 1, 2010, but she was not present. *See* CP 179-85. She did not witness defendant enter; she did not witness Ms. Young give or deny permission for defendant to enter; she did not witness the assault on Mr. Barrow. Any testimony she might have provided would have been based on hearsay and therefore inadmissible.

Counsel's performance was not deficient when he failed to call witnesses whose testimony was biased, possibly prejudicial to defendant's case, and irrelevant.

- b. Counsel's failure to move to strike testimony was neither deficient performance nor prejudicial.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An

attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990). It is improper for a witness to offer an opinion regarding the guilt or veracity of a defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Defendant claims that his counsel's cross-examination of Sergeant Carpenter elicited improper opinion testimony that included a clear inference of guilt and failed to move to strike the offending testimony.

During the cross examination of Sergeant Carpenter, counsel attempted to show that the sergeant had no first hand knowledge of the event. RP 116-17. Sergeant Carpenter did not respond to counsel's questions with "yes" or "no" answers, but indicated that he "imagined" that the "person who came storming through the door" was the instigator of the fight. RP 116. Repeated attempts to point out that Sergeant Carpenter could not have known who started the fight were unsuccessful, as the sergeant continued to reiterate his belief that the action of forcing the door open was the initial aggressive act and that the person who forced the door "probably started the fight." RP 117.

It is likely that if counsel had objected to the responses, the court would have stricken them. However, counsel had a legitimate reason for not moving to strike the answers. Counsel was able to show the jury that Sergeant Carpenter was not present, could not have known first hand what had occurred, and that his testimony was mere speculation. Sergeant Carpenter clearly had no information that defendant had permission to be

inside the apartment and his repeated attempts to avoid a direct answer to the questions presented could have undermined his credibility with the jury.

Defendant also cannot show that the verdict would have been different if she had objected to the testimony. Mr. Barrows testified that defendant forced the door open without Ms. Young's permission and immediately attacked him. Ms. Young called 911 to request the police because defendant "broke into her apartment," and was fighting her friend "for no reason." Exhibit 1. Even defendant admitted that he forced the door open and that he continued to beat Mr. Barrows after Mr. Barrows asked him to stop. RP 126, 128-29. Given the evidence presented at trial, the officer's testimony that the person who forced the door was probably the first aggressor had no affect on the jury's verdict.

c. Counsel's performance was not deficient for failing to object to proper argument.

Generally, a defense attorney's failure to object to a prosecutor's closing argument is not deficient performance because lawyers "do not commonly object during closing statement absent egregious misstatements." *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (internal quotations omitted). During closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). A prosecutor's

remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Defendant claims that his trial counsel's performance was deficient for failing to object during the State's closing argument. Specifically, he claims that the prosecutor's arguments regarding witness credibility were improper. Yet, as will be more fully argued in the section on prosecutorial misconduct, the prosecutor was commenting on witness credibility based on the evidence. As the prosecutor's argument was proper, counsel's failure to object was not deficient performance.

Even if the prosecutor's argument was improper, the jury was instructed that the lawyers' arguments were not evidence and that the jurors were the sole judges of witness credibility. CP 51-81 (Jury Instruction 1). Juries are presumed to follow the court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Defendant has not shown that the outcome of the case was affected by his attorney's performance.

- d. Based on the entire record, defendant received constitutionally effective assistance of counsel.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d

223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996).

Case law directs the court to look at the entire record when evaluating claims of ineffective assistance of counsel. A review of the entire record in this case shows that counsel was a tireless advocate for his client and truly tested the State's case. Defense counsel filed and argued several pre-trial motions; put forth motions in limine; made objections; cross-examined the State's witnesses; and put on a defense case. Defendant cannot prove that counsel's performance was deficient or that he was prejudiced by it. The record does not support a finding of ineffective assistance of counsel. Defendant's claim cannot prevail.

2. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the

defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). A new trial will be ordered only if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578-79, 79 P.3d 432 (2003).

During closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). A prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

If an instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App. at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Defendant assigns error to several aspects of the prosecutor’s closing argument. As he did not object³ to any of the statements which he now claims were improper, he must show that the remarks are so flagrant and ill-intentioned that any prejudice could not have been cured by an instruction from the court. As none of the remarks to which he now assigns error were improper, defendant cannot make such a showing.

- a. The prosecutor’s comments about witness credibility was proper closing argument.

A prosecutor arguing credibility commits misconduct if it is clear and unmistakable that he is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). While prosecutors may not state their personal beliefs about the defendant’s guilt or innocence or the credibility of the

³ As noted above, defendant also claims that counsel’s failure to object was deficient performance.

witnesses, comments are deemed prejudicial only where there is a substantial likelihood the misconduct affected the jury's verdict.

Dhaliwal, 150 Wn.2d at 577–78. Further, the effect of a prosecutor's comments is determined by examining the remarks in the context of the State's total argument. *Id.*

Here, defendant claims that the prosecutor committed misconduct in closing argument when she expressed her personal belief of Mr. Barrows' credibility when she described his testimony as "candid," and did not "embellish or exaggerate what happened." *See* Brief of Appellant at 18. Defendant also claims that the prosecutor expressed her personal belief of Mr. Barrows' credibility during rebuttal closing argument by stating, "Of the two, Mr. Barrows is the one that has credibility. Mr. Jones has none." Brief of Appellant at 19.

When read in the context of the entire argument, the prosecutor's statements were not an expression of her personal opinion of Mr. Barrows' credibility. Rather, the prosecutor properly argued that Mr. Barrows was credible based on the evidence presented at trial.

The prosecutor began her argument on credibility by pointing out that defendant had to account for the physical evidence presented at trial:

Now, Mr. Jones knows that he has to account for the marks on the neck. He has to come up with an explanation because he can't deny that those marks are there. So he has to come up with an explanation. So his explanation is, well, I grabbed him, I grabbed him with my hand. I didn't strangle him though. That's his explanation. As opposed to

Mr. Barrows, who candidly told his story. He didn't embellish it. He didn't exaggerate. Even when I asked him, "Well, were you thrown into the mirror?" Mr. Barrows is quick to point out, "No, I wasn't thrown. This is what happened. He was charging me and I backed into the mirror." It sounds much worse obviously if he's accusing Mr. Jones of tossing him into the mirror. But Mr. Barrows, he's not here to embellish or exaggerate. He's here to tell you what happened in that apartment on April 1, 2010.

RP 161-62. The prosecutor's reference to Mr. Barrows' candid testimony was clearly a reasonable inference of Mr. Barrows' credibility based on the evidence. The prosecutor even referenced the evidence upon which she relied. She also referenced the court's instructions to the jury and pointed out that the jurors were the sole judges of credibility. RP 162. Defendant has failed to show that the prosecutor's statements during closing argument were improper, let alone so flagrant or ill-intentioned that an instruction could not have cured any potential prejudice.

During rebuttal closing argument, the prosecutor stated:

From Mr. Barrows' perspective, whether or not the door was on a hinge is irrelevant. When that door came flying in, for all Mr. Barrows knew, it didn't come off the hinges. Maybe that is what it felt like for him. You saw the photos and the door is on the hinges. That in and of itself doesn't disparage Mr. Barrows' credibility. Of the two, Mr. Barrows is the one that has credibility. Mr. Jones has none.

RP 180-81. This was a fair response to defendant's argument that Mr. Barrows was not credible because the door frame was damaged, rather than the entire door. *See* RP 169-71.

Finally, the prosecutor argued that, even if the jury accepted defendant's version of the event, defendant was still the first aggressor and could not claim self defense:

So let's just believe for a moment that what Mr. Jones says is true, that Mr. Barrows, in fact, did attack and punch him twice. Just suspend reality for a moment and go along with Mr. Jones' version. Even if you did believe that, by virtue of him kicking his way into that apartment, he's the primary aggressor. So even if you thought Mr. Barrows was the one who first punched Mr. Jones, it doesn't matter unless you find beyond a reasonable doubt that Mr. Jones' actions were the cause of it. Obviously Mr. Barrows told you that wasn't the case. The door came flying open, Monique' Young took off for the bathroom and Mr. Jones came in and started beating the crap out of him. That is the most logical explanation. That is the most reasonable explanation and for the simple reason, it's the truth.

RP 183-84. This argument was a fair response to defendant's theory of self defense. The prosecutor's argument was proper as she is permitted to draw a reasonable inference of Mr. Barrows' credibility based on the evidence admitted at trial.

The prosecutor's arguments regarding Mr. Barrows' credibility were not expressions of her personal beliefs, but were proper inferences based on the evidence presented at trial.

b. The prosecutor did not argue facts not in evidence.

Defendant claims that the prosecutor improperly encouraged the jury to render a verdict on facts not in evidence, yet the prosecutor argued only facts and reasonable inferences based on the evidence presented at trial. The prosecutor's numerous references to the door being kicked down were based on both Mr. Barrows' testimony and Ms. Young's statements to the 911 operator. Both stated that defendant kicked the door in. RP 44; Exhibit 1. Additionally, the prosecutor noted that no one witnessed defendant kick the door, but that whether defendant used his foot or his shoulder to force the door was irrelevant. *See* RP 157.

The prosecutor also argued that it was unreasonable to believe that defendant had a key to the apartment as he claimed. The prosecutor argued that defendant did not have a key, because a person with a key does not force their way into an apartment. RP 157-58. The prosecutor also argued that if defendant had unlocked the door with a key but merely pushed against the door with his shoulder, the doorframe would not have been damaged. RP 179. This was circumstantial evidence which refuted defendant's claim that he had a key to the apartment and permission to be inside.

The prosecutor's arguments that defendant kicked the door in and that he did not have a key to the apartments were reasonable inferences drawn on the evidence presented at trial.

- c. The prosecutor's argument regarding the evidence which supported a reasonable inference that defendant entered or remained unlawfully in the building was proper.

Defendant claims that the prosecutor "mischaracterized the law when she told the jury that the 'physical evidence' and the testimony of Mr. Barrows and Mr. Carpenter 'disputed' that Mr. Jones had a 'right to be there.'" Brief of Appellant at 23. A review of defendant's argument does not support his contention that the prosecutor misstated the law. The prosecutor properly stated the law when she noted that the State had to prove that defendant entered or remained unlawfully. *See* RP 155, 156. The prosecutor then argued that the jury could infer that defendant entered or remained unlawfully, in part because he forced entry into the apartment. RP 157-58. While defendant may disagree with this inference, it is an argument based on the facts of the case, not a misstatement of the law.

Several of defendant's claims of prosecutorial misconduct appear to be arguments that a prosecutor may not draw reasonable inferences based on circumstantial evidence presented at trial. Yet circumstantial

evidence is considered equally reliable as direct evidence. Contrary to defendant's claims on appeal, nothing limits a prosecutor to only arguing inferences based on direct evidence.

3. DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE TRIAL COURT ADMITTED THE 911 TAPE AS MS. YOUNG'S STATEMENTS TO THE 911 OPERATOR WERE NONTESTIMONIAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause "applies to 'witnesses' against the accused-in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It bars "admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence. *Davis*,

547 U.S. at 821; *State v. Pugh*, 167 Wn.2d 825 831-32, 225 P.3d 892 (2009).

Statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the primary purpose of interrogating the speaker was “to enable police assistance to meet an ongoing emergency.” *Pugh*, 167 Wn.2d at 832. But they are testimonial if circumstances “objectively indicate that there [wa]s no such ongoing emergency” and “the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* (quoting *Davis*, 547 U.S. at 821).

Four factors help determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or to establish or prove past events: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation. *Pugh*, 167 Wn.2d at 832 (quoting *Davis*, 547 U.S. at 827).

Davis v. Washington consisted of two consolidated cases: *State v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (2005), and *Hammon v. State*, 829 N.E.2d 444 (Ind.2005). For *Davis*, the Court found the 911 call was

nontestimonial because the victim's statements were made about events as they were actually occurring, a reasonable listener would recognize that she was facing an ongoing emergency, the call was a cry for help in the face of a physical threat, and the environment was chaotic and probably unsafe. **Davis**, 547 U.S. at 827–28. The Court also explained that the statements in **Davis** were taken while the declarant was alone, unprotected by police, in apparent immediate danger from the defendant, and seeking aid, not relating past events. *Id.* at 831–32.

In contrast, for **Hammon**, the Court found that written statements made to police officers after they arrived were testimonial because the purpose of the interrogation was to investigate a possible crime where there was no immediate threat and no emergency in progress, and the witness testified as to what had happened rather than what was happening. *Id.* at 829–30.

In **Pugh**, the victim called 911 and stated “My husband was beating me up really bad.” **Pugh** 167 Wn.2d at 829. When asked if Pugh was still present, the victim responded, “No he’s walking away.” *Id.* While she was on the phone with the 911 operator, Pugh was outside the residence and she could not see him. *Id.* at 829-30. At trial, the 911 tape was admitted as an excited utterance. *Id.* at 830. The victim did not comply with the subpoena and did not appear at trial as a witness. *Id.* at 830-31.

Here, Ms. Young's statements to the 911 operator were clearly nontestimonial because they were made under circumstances objectively indicating that her primary purpose was to call for help. Ms. Young called 911 because she faced an ongoing emergency where defendant kicked in her door and was assaulting her friend inside the apartment. Exhibit 1. At the beginning of the call, Ms. Young indicated that defendant was currently in her room, fighting with her friend. Exhibit 1. The defendant was obviously present while she was on the phone with 911, as a listener can hear her yelling at the defendant and calling him "crazy" several times. Exhibit 1. Ms. Young clearly exhibited difficulty focusing on the 911 dispatcher's questions as she ignores several questions and shouts "oh my fucking God" on more than one occasion. Exhibit 1. Ms. Young indicated that defendant left the scene in his truck mid-way through the call, but there is no indication from her that he may not be returning. See Exhibit 1.

Ms. Young's statements to the 911 operator meet the four factors set forth in *Pugh* and *Davis*. Like the victims in those cases, Ms. Young was clearly speaking of events as they occurred, rather than merely describing past events. A reasonable person would recognize that Ms. Young was facing an ongoing emergency as defendant was initially present and certainly had the ability to return before police arrived. The 911 operator's questions related to descriptions of defendant and descriptions of the event to determine whether the victim required medical

assistance; both of which were necessary to resolve the present emergency. *See* Exhibit 1. Ms. Young's conversation with the 911 operator was not a formal interrogation.

As Ms. Young's statements to the 911 dispatcher were nontestimonial, defendant's right to confrontation was not violated when the court admitted the 911 tape at trial.

4. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF BURGLARY IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Unchallenged findings of fact are verities on appeal. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016, 41 P.3d 483 (2002).

Here, the State charged defendant with one count of burglary in the first degree, alleging:

- (1) That on or about the 1st day of April, 2010, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with the intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and
- (4) That any of these acts occurred in the State of Washington.

CP 51-81 (Jury Instruction 13). “A person enters or remains unlawfully when he is not then licensed, invited, or otherwise privileged to enter or remain.” CP 51-81 (Jury Instruction 8).

Defendant claims that, because he testified that he had a key to the apartment, there was insufficient evidence to show that he entered unlawfully. *See* Brief of Appellant at 35-36. Yet the testimony provided by Mr. Barrows and Ms. Young’s statements to the 911 operator, as well as the evidence of defendant’s forced entry, indicates that defendant did not have permission to be in the apartment at that time.

Mr. Barrows testified that, when defendant arrived, he started “banging” on the door and demanding to be let in. RP 43. Ms. Young did not unlock the door but pleaded, “Please don’t do this,” to defendant. RP 44. Defendant then kicked in the door, knocking it off its hinges. RP 44. Ms. Young informed the 911 operator that defendant “broke into” her apartment, “kicked” the door in, and that she tried to talk him out of breaking into her house. Exhibit 1. Even the fact that defendant forcibly broke the doorframe to gain entry supports a reasonable inference that defendant did not have license, invitation, or was otherwise privileged to enter.

Defendant claims that it was unrefuted at trial that he had a key and thereby license to enter. Brief of Appellant at 35-36. Yet nothing in Mr. Barrows’ testimony indicates that defendant either used a key or had Ms. Young’s permission to enter. That Ms. Young felt the need to call 911 for help also supports a reasonable inference that defendant was uninvited. It was also reasonable for the jury to infer that a person with a key would not have needed to forcibly enter. While defendant claimed that he had a key to open the door, the jury was free to find his testimony not credible.

Taken in the light most favorable to the State, the circumstantial evidence in this case supports a reasonable inference that defendant

entered or remained inside the apartment unlawfully. The State presented sufficient evidence to convince a reasonable finding of fact that defendant was guilty of burglary in the first degree.

5. THE TRIAL COURT PROPERLY SENTENCED
DEFENDANT TO A MANDATORY TERM OF
COMMUNITY CUSTODY.

The 2009 amendments to the sentencing reform act repealed RCW 9.94A.715 and changed the term of community custody the court shall impose for violent offenders from a range of 12 to 18 months, to a fixed term of 18 months. *See* RCW 9.94A.701(2) (“A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.”). Under RCW 9.94A.728(1), a defendant may have his sentence reduced by earned release time. Violent offenders “may become eligible, in accordance with a program developed by the department, for transfer to community custody in lieu of earned release time.” RCW 9.94A.728(2)(a).

Here, defendant claims that the court improperly sentenced him to a variable period of community custody. However, the judgment and sentence clearly states that defendant is subject to either 18 months of community custody, or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer. CP 107-20. A review

of RCW 9.94.701 and .728 indicates that the language contained in the judgment and sentence is accurate. Under RCW 9.94A.728, if defendant earned early release credit, he would be subject to community custody until the term of his sentence ended. If that length of time exceeded 18 months, he would complete his sentence on community custody, but would not be subject to the additional term set forth by the court. If defendant does not earn early release time, he will serve 75 months in custody, and still serve 18 months community custody as set by the court. If defendant's early release credit is less than 18 months, he will serve the remainder of his sentence, and then only a portion of the term set by the court, the total of which would be 18 months. Nothing in defendant's community custody term is variable, except as much as it may be reduced by defendant's earned early release.

If this Court does find that the language in the judgment and sentence is inaccurate, defendant is at most entitled to entry of a corrected judgment and sentence which strikes the offending language.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S POST TRIAL MOTION FOR RELIEF FROM JUDGMENT.

The trial court's denial of a CrR 7.8 motion is reviewed for an abuse of discretion and will not be reversed absent an abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). "A

trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds.” *State v. Pierce*, 155 Wn. App. 701, 710, 230 P.3d 237 (2010).

Under CrR 7.8(b)(1), the court may grant relief from judgment for newly discovered evidence. A trial court will not grant a new trial on the basis of newly discovered evidence unless the moving party demonstrates that the evidence “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of these factors is grounds to deny a new trial. *Id.*

When considering whether newly discovered evidence will probably change the trial’s outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence. *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980). Significantly, the standard is “probably change,” not just possibly change the outcome. *Williams*, 96 Wn.2d at 223. “[D]efendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial.” *State v. Riofta*, 166 W.2d 358, 369, 209 P.3d 467 (2009).

Under CrR 7.8(5), the court may grant relief from judgment for “[a]ny other reason justifying relief from the operation of the judgment.” But CrR 7.8(5) only applies in extraordinary circumstances not addressed by any of the four preceding subsections of the rule. *See State v. Dennis*, 67 Wn. App. 863, 865, 840 P.2d 909 (1992). Extraordinary circumstances are those that relate to irregularities which are extraneous to the court’s action or go to the question of the regularity of the proceeding. *State v. Aguirre*, 73 Wn. App 682, 688, 871 P.2d 616, *review denied*, 124 Wn.2d 1028 (1994).

Here, defendant made a motion for new trial based on a “hybrid, somewhere between ineffective counsel and failing to discover evidence.” RP (6/17/11) 2-3. Specifically, defendant believed his trial attorney should have called Ms. Young, Ms. Lane, and a Joanna Juarez as witnesses. RP (6/17/11) 3. Defendant described the testimony each witness would have provided, which was similar to the declarations they provided after the trial. CP 179-85; RP (6/17/11) 4-5. Defendant believed that these witnesses’ testimony would have called into question Mr. Barrows’ credibility. RP (6/17/11) 5-6.

The court denied defendant’s motion. CP 163; RP (6/17/11) 10-11. The court held that, based on her recollection of the record, “defendant did not want [Ms. Young] to appear for trial.” RP (6/17/11) 11. The court also determined that the declarations submitted were not credible. RP (6/17/11) 11.

The trial court's impression that defendant did not want Ms. Young to testify was supported by the record. The prosecutor had acquired a material witness warrant for Ms. Young, but she avoided service. RP 7, 31; RP (6/17/11) 7. Mr. Barrows informed the prosecutor that he had seen Ms. Young and defendant "riding around in a car together" a month prior to trial. RP 31. At 9:00 a.m. on the day of trial, Mr. Barrows started receiving telephone calls and text messages calling him a "snitch," from an individual who was a friend of Ms. Young's. RP 31. While defendant claimed that he wanted Ms. Young to testify, there was no effort made on defendant's behalf to have her testify until her post-conviction declaration. *See* RP 33. The judge also had the opportunity to observe defendant's behavior and demeanor during the trial. Based on the record before the court, the judge's determination that defendant did not want Ms. Young to testify was reasonable, and not based on untenable grounds or for untenable reasons.

Court also acted within its discretion when it found the declarations not credible due to their timing and bias toward their relationship with defendant. RP (6/17/11) 11. Defendant was found guilty on October 13, 2010. Ms. Young's declaration was dated for his day of sentencing, December 17, 2010. CP 179-85. Ms. Lane's declaration was dated February 2, 2011, and Ms. Juarez's declaration was dated March 22, 2011. CP 179-85. Each of the declarants admitted a close friendship with defendant. CP 179-85. Ms. Juarez made claims that

strained credulity. *See* CP 179-85; RP (6/17/11) 8. Based on the evidence presented at trial, the timing of the declarations, and the claims contained therein by defendant's close friends and family, the court's finding that the declarants lacked credibility was not unreasonable.

Defendant has not shown that his "newly discovered" evidence was credible, nor has he shown an extraordinary circumstance that related to an irregularity in the court's action or proceedings.

7. DEFENDANT HAS FAILED TO SHOW THAT HIS TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411

U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also, State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also, State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and

nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), *with State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), *and State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for

truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

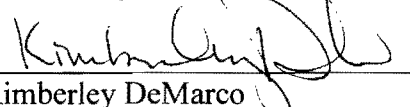
In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's convictions and sentence for first degree burglary and first degree assault.


DATED: March 2, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


Kimberley DeMarco
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date 3.5.12 Signature J. P. Heren

PIERCE COUNTY PROSECUTOR

March 05, 2012 - 10:45 AM

Transmittal Letter

Document Uploaded: 416387-Respondent's Brief.pdf

Case Name: St. v. Jones

Court of Appeals Case Number: 41638-7

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

sheriarnold2012@yahoo.com